No. 76-5325

In the Supreme Court of the United States

BEN EARL BROWDER,

Petitioner,

vs.

DIRECTOR, DEPARTMENT OF CORRECTIONS, STATE OF ILLINOIS,

Respondent.

BRIEF AMICUS CURIAE OF THE CHICAGO COUNCIL OF LAWYERS

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ORAL ARGUMENT REQUESTED

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INTEREST OF AMICUS CURIAE

The Chicago Council of Lawyers is an association of approximately 1,200 attorneys in Chicago. The Council's principal concern is the improvement of the administration of justice, both in the federal and the state courts. In accordance with this concern, the Council has addressed itself to such matters as Local Rule 22 of the Northern District of Illinois federal district court, and to the federal district court rules regulating comment by attorneys. See, e.g., *Chicago Council of Lawyers* v. *Bauer,* 522 F.2d 242 (7th Cir. 1975), cert. denied sub nom. *Cunningham* v. *Chicago Council of Lawyers,* 96 S.Ct. 3201 (1976).

The Council's interest in this case relates to petitioner's challenge to Circuit Rule 35 of the United States Court of Appeals for the Seventh Circuit, entitled "Plan for Publication of Opinions of the Seventh Circuit." The Council is concerned that this Rule raises serious jurisprudential and constitutional questions, as amicus discusses *infra*. We believe these questions deserve the fullest consideration by this Court, and thus have filed this brief amicus curiae.*

STATEMENT OF FACTS

The parties have set forth the underlying facts and procedural history of this case in their respective briefs. For purposes of this brief amicus curiae we summarize only those points relevant to Circuit Rule 35, the Plan for Publication of Opinions of the Seventh Circuit, set out fully in the appendix to petitioner's petition. Pet. for Cert., A53.

The district court granted petitioner's request for a writ of habeas corpus, and later denied respondent's motion to reconsider, in two unpublished opinions. Pet. for Cert., A3-16, A26. The Court of Appeals for the Seventh Circuit reversed, in a seven page typed decision. Pet. for Cert., A30-36. Despite a number of indicia of precedential value,[1]

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* Both petitioner and respondent have consented to the filing of this brief.

[1] These include the reversal of the district court, the substantial Fourth Amendment issue raised by the case, the absence of any direct precedent from the Seventh Circuit, the arguable conflict between the decision and precedent in several other jurisdictions, Pet. for Cert., at 20 nn. 25, 26, and the arguable resolution of an issue explicitly left open by a prior decision of this Court. Pet. for Cert., at 20.

the Court of Appeals determined under Circuit Rule 35 to issue this ruling as an unpublished "order" rather than as a published "opinion." The order is recorded in the table of unpublished rulings at 534 F.2d 33 (7th Cir. 1976). The Court of Appeals also denied rehearing without opinion. Pet. for Cert., A37.

Invoking the provision of Circuit Rule 35 permitting "any person" to so move, petitioner timely moved for issuance of the Court of Appeals' decision as a published opinion.[2] The appellate court denied that motion without explanation. Pet for Cert., A38.

In his petition for a writ of certiorari, which has been granted in full by this Court, petitioner stated his fourth "question presented" as follows:

> May a United States Court of Appeals reverse a decision of a district court in an unpublished and non-citable opinion, when the case is not controlled by direct precedent, involves a substantial question pertaining to the protections of the Fourth Amendment, and where public notice of the decision might encourage Illinois to follow the lead of the American Law Institute and other states in enacting a statute to protect its citizenry from warrantless arrests for investigation?

Pet. for Cert., 3.

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[2] Petitioner's motion, filed June 28, 1976, argued that the case involved an issue of continuing importance; that police officers might rely on its disposition in regulating their future conduct despite non-publication of the "order;" that publication might alert state courts to fashion corrective procedures; that the case established a new rule of law, as the first case in the Circuit to consider an arrest of two persons to determine which, if either, should be charged; and that uniformity of decision required publication, since the order reversed a district court's decision, and another district judge in a similar case would likely reach the same result as his brother absent publication of the Court of Appeals' ruling.

SUMMARY OF ARGUMENT

The no-publication, no-citation Rule of the United States Court of Appeals for the Seventh Circuit works serious detriment to litigants, to jurisprudence, and to the Constitution. This Rule deserves full consideration by this Court in this case.

The genesis of the Rule lies in increasing judicial concern regarding the large amount of time necessitated by the preparing of, and writing of, publishable opinions. The Rule provides that certain decisions shall be issued by way of "orders," which are not publishable and are not to be cited to any court within the Seventh Circuit.

The detriments imposed by Rule 35 severely outweigh its claimed benefit of administrative convenience. These detriments are both non-constitutional, and constitutional, in nature. The non-constitutional vices of the Rule flow from a number of consequences of the Rule. First, the Rule imposes inequality upon litigants. Those litigants and attorneys located in Chicago have access to unpublished "orders," at least in terms of geography, whereas litigants living elsewhere, and litigants who are indigent or who are immobilized because of handicap or institutionalization, are disadvantaged in securing these "orders." Moreover, litigants and attorneys who regularly appear before the appellate court obtain a familiarity with unpublished "orders" denied to other parties who only occasionally, if even more than once, argue before the Court of Appeals. Moreover, inequality flows from the possibility that similarly situated litigants will be treated differently in terms of ultimate dispositions.

It is insufficient answer to respond that since the "orders" are not to be cited, they are not needed anyway. Indeed, such "orders" do have very significant impact upon litigants.

Second, Circuit Rule 35 impairs the decision-making process of the appellate court. By enabling the Court of Appeals to limit the application of legal doctrine to the facts of the particular appeal, the rigor of careful opinion-writing is lost, and thereby the 'rightness' of decision is jeopardized.

Third, the Rule, even though barring litigants from relying upon unpublished "orders," does not bar the Court of Appeals and the trial courts of the Seventh Circuit from so doing. And even if it did, the fact is that human nature, peer pressure, and the demands of institutional conformity would all militate against these courts in fact being able to totally disregard the existence of prior rulings of which they are aware, even if those rulings in theory are not precedential in import.

Fourth, the Rule fails to assure that all significant rulings are published. Indeed, numerous examples exist which demonstrate that in fact the Rule has failed as an adequate guideline for assessing the significance of decisions.

Fifth, the Rule impairs the ability of litigants to secure effective review in this Court. The very fact that a decision is unpublished is a signal that it is not 'important.' Moreover, the relaxation of the rigor of opinion-writing, leading to diminished discussion of the factual context of the case, impairs this Court's ability to assess the ruling below.

Finally, the Rule produces the appearance of injustice. Even though the Court of Appeals regards unpublished "orders" as non-precedential, the public in general, and

litigants in particular, still must regard the existence of rulings which are not published and which are not to be cited as creating the appearance of a selective system of secrecy, thereby mitigating the appearance of justice.

As a result of all these vices, Rule 35 should be abolished. And it can be—on non-constitutional grounds, as being in excess of the Court of Appeals' authority, as being in conflict with Rule 19 of this Court, and as being unreasonable. The supervisory power of this Court and 28 U.S.C. §2071 form the basis—each independent of the other—for this Court's striking down Rule 35.

Apart from non-constitutional defects of Rule 35, there is the separate problem that the rule very seriously impacts upon the First Amendment. It trenches upon the 'right to know,' and it constitutes an unjustified scheme of censorship. Moreover, the rule is fatally vague. Thus, the Rule must fail on First Amendment grounds.

Even if this Court should conclude that the Rule is not so defective—either on non-constitutional or constitutional grounds—as to warrant abolition, it nevertheless should be modified, pursuant to this Court's supervisory authority over the lower federal courts.

ARGUMENT

I.

INTRODUCTION

Petitioner, in challenging the application of Circuit Rule 35—the no-publication, no-citation rule of the United States Court of Appeals for the Seventh Circuit—has asked this Court to "review the burgeoning trend towards 'secret law' " in the United States Courts of Appeals. Pet. for Cert., at 22. His posing of the problem is far from the most dramatic which has been offered. One commentator, extolling the role of printed judicial decisions in Europe's emergence from "lawless tyranny," implies that no-publication rules may place us on the return path to the Dark Ages. Gardner, "Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?," 61 A.B.A.J. 1224, 1227 (1975).[3]

We do not think it necessary to sound the alarum of jurisprudential disaster to nonetheless reach the conclusion that Circuit Rule 35 works very serious detriment to litigants,

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[3] For other opposition to the no-publication, no-citation rule see Commission on Revision of the Federal Court Appellate System, Hearings—Second Phase 1974-1975, Vol. I, 1974 Hearings (hereinafter "Commission Hearings"), Testimony of Willard J. Lassers on behalf of the American Civil Liberties Union, Illinois Division and the Chicago Lawyers' Committee for Civil Rights Under Law (hereinafter "Lassers Testimony"), at 554-58; Commission Hearings, *supra*, Report on Seventh Circuit Court of Appeals Rule 28 by the Chicago Bar Association Committee on Federal Civil Procedure, at 612 et seq.; Report of the Chicago Bar Association Committee on Appellate Court Congestion and Procedure, Chi. Bar Rec. 16, 20-21 (July-Aug., 1974).

to jurisprudence, and to the Constitution. Amicus recognizes that the Rule was born of no such regressive intentions; that, however, does not diminish the actual effects of the Rule. Nor does the ostensibly innocuous purpose of the Rule—"to reduce the proliferation of published opinions," Rule 35, §(a)—mitigate its significant impact upon the business of the Seventh Circuit Court of Appeals. In 1973, its first year of operation,[4] the rule was employed to dispose of 62% of all appeals by unpublished "orders;" in 1974 the figure was 46%; and in the first ten months of 1975 47%.[5]

In this brief amicus will address both the no-publication aspect of Rule 35 and its no-citation corollary, embodied

[4] The predecessor to Rule 35—Rule 28, became effective on February 1, 1973. The Rule was amended as of July 1, 1976 so as to provide that "any person may move for publication of an unpublished order," and to further provide that decisions reversing published lower court rulings be themselves published. These changes are embodied in sections (d)(3) and (c)(1)(v), respectively, of Rule 35.

[5] Hastings, "The Seventh Circuit Plan for Publication of Opinions —A Continuing Experiment," 51 Ind. L. J. 366, at 371 (1976) (hereinafter "Hastings"). Reliance in 1973 on unpublished rulings in other Circuits ranged from 26% in the Eighth Circuit to 78% in the District of Columbia Circuit. Commission Hearings, *supra* note 3), Testimony of Edward H. Hickey, President, Bar Association of the Seventh Federal Circuit, at 451. Amicus would note that not only does the Seventh Circuit Court of Appeals hand down a considerable number of rulings by unpublished "orders;" the Court further does not even publish a statistical summary disclosing how many appeals are in fact terminated by "orders," as opposed to "opinions." See e.g., *The Judicial Business of the United States Courts of the Seventh Circuit—1976*, at 12, lumping together under the label "Appeals Terminated by Opinion" those appeals terminated both "by slip opinions and by Cir. Rule 35 'Unpublished Orders'."

in the same Rule.[6] Indeed, the two parts of the Rule are symbiotically bound together, both compelling analysis if any accurate and realistic conclusions are to be drawn.[7]

II.

THE GENESIS AND CONTENT OF CIRCUIT RULE 35.

Circuit Rule 35, providing for the non-publication and correlative non-citation of some rulings of the Court of Appeals for the Seventh Circuit, is the ultimate product of a generalized concern among the judiciary regarding the large expenditures of time required for researching and thence writing publishable opinions. The Committee on Use of Appellate Court Energies of the Advisory Council for Appellate Justice reported in 1973 that appellate court judges "ranked opinion-writing as the second most significant cause of delay in the highest appellate courts. . . ."[8] As a means of dealing with this problem, the

[6] This Court has just recently had before it the same Rule 35 for consideration, in *Do-Right Auto Sales* v. *The United States Court of Appeals for the Seventh Circuit*, ... U.S. ....., 97 S.Ct. 341 (1976). The Court of Appeals filed a responsive brief therein. This Court denied the petition.

[7] See e.g., Committee on Use of Appellate Court Energies of the Advisory Council on Appellate Justice, *Standards for Publication of Judicial Opinions*, FJC Research Series No. 73-2, State Courts Works-in-Progress Series, August, 1973, at 18-21 (hereinafter *"Publication Standards"*). See also Commission Hearings, *supra*, note 3, Testimony of Honorable Robert Sprecher, Judge, Seventh Circuit Court of Appeals, at 532 (hereinafter "Sprecher Testimony"): "I would think that if a no-citation rule did not go hand in hand with a no-publication rule, I would feel that we should do away with the no-publication rule and go back to the full publication rule. . . ."

[8] *Publication Standards, supra* note 7, at 1.

Committee recommended that "opinions be published only if certain defined standards for publication . . . (were) satisfied."[9] This non-publication of at least some rulings would, in the Committee's view, respond to a number of problems and, in so doing, produce a number of benefits:

a. Unlimited proliferation of published opinions constitutes a burden and a threat to a cohesive body of law. . . .

b. Publication of opinions burdens the work of writing opinions. While limitation on the publication of opinions does not reduce the number of opinions to be written, it greatly reduces the time and resources that must be devoted to opinion preparation. An opinion prepared to inform the parties of the reasons for a decision may properly be quite different from an opinion that will be published and become part of the body of precedent.

c. The burden on the lawyer is commensurate with that of the judge in terms of accountability in preparing his cases. The endless search for factual analogy requires immense expenditures of time and funds that can result in reliance upon quirks rather than upon careful rationalization and application of the developing law.

d. . . . Posting, maintenance, shelving and librarian services result in time and money costs disproportionate to the value of the materials.

e. The burden on the publishing industry to continue to supply a complete reporting services (sic) at prices that are tolerable appears to be beyond their capacity.

f. As the number of opinions grows, law-finding devices must proliferate and expand, and this is

[9] Id. at 4.

in itself a burden. If the finding devices do not grow, they become less effective, from loss of precision and sophistication.[10]

A necessary adjunct to the no-publication rule, the Committee concluded, was a no-citation rule. Here, too, the Committee provided a listing of the bases for its conclusion:

1. It is unfair to allow counsel, or others having special knowledge of an unpublished opinion, to use it if favorable and withhold it if unfavorable.

2. Cost will be reduced by eliminating the need to obtain and examine the mass of opinions that are not designated for publication.

3. The absence of a non-citation rule would encourage the inclusion in opinions not designated for publication of facts and details of reasoning, thus frustrating the purposes underlying non-publication.

4. Cost and delay of cases appealed only because they are apparently at odds with unpublished opinions can be reduced.

5. Great difficulty, if not impossibility, would be involved in determining whether an unpublished opinion has been overruled.[11]

Other movement towards a non-publication system also was afoot at about the same time as the Committee on Use of Appellate Court Energies was working. At its Spring, 1972 meeting the Judicial Conference of the United States addressed the question of publication, the Director of the Federal Judicial Center presenting a recommendation on the matter. The Conference referred the recommendation

[10] Id. at 7-8.

[11] Id. at 19.

to its Committee on Court Administration.[12] At its Fall, 1972 meeting the Conference "approved the circulation to all circuit judges of the detailed recommendations of the Board of the Federal Judicial Center concerning the publication of opinions of the courts of appeals," and "requested each circuit to develop an opinion publication plan by January 1, 1973."[13] The predecessor of Circuit Rule 35 followed.[14]

Circuit Rule 35, entitled "Plan for Publication of Opinions of the Seventh Circuit," sets out a scheme for the Court of Appeals' determination as to which of its decisions shall, and which shall not, be issued as publishable rulings. A number of criteria are provided to assist in the determination—those rulings which satisfy the criteria

[12] Report of the Proceedings of the Judicial Conference of the United States, April 6-7, 1972, at 3.

[13] Report of the Proceedings of the Judicial Conference of the United States, October 26-27, 1972, at 33.

[14] For further explication of the history of no-publication, no-citation rules in general, and the genesis of Circuit Rule 35 in particular, see Commission Hearings, *supra* note 3, Sprecher Testimony, *supra* note 7, at 519-39; Hastings, *supra* note 5. As of today, every Circuit has adopted a plan providing for the non-publication of some opinions. The statistical configuration is less uniform with regard to the non-citation aspects of these plans. The plans of the District of Columbia, First, Second, Sixth, Seventh, Eighth, and Ninth Circuits expressly forbid the citation of unpublished decisions. The Tenth Circuit allows citation of an unpublished opinion, but requires the citing party to serve a copy upon opposing counsel. The plans of the Third, Fourth, and Fifth Circuits are silent as to citation. The Fourth Circuit has stated, however, that it "prefers that . . . (its unpublished memorandum decisions) not be cited" to it and that it will not itself "in published opinions cite or refer to memorandum decisions." *Jones* v. *Superintendent, Virginia State Farm*, 465 F.2d 1091, 1094 (4th Cir. 1972).

are thence deemed "opinions;" rulings failing to pass muster are denominated "orders." Rule 35, §(b).[15]

[15] Rule 35 provides in relevant part:

(c) Guidelines for Method of Disposition.

(1) Published opinions: Shall be filed in signed or per curiam form in appeals which

(i) Establish a new or change an existing rule of law;

(ii) Involve an issue of continuing public interest;

(iii) Criticize or question existing law;

(iv) Constitute a significant and non-duplicative contribution to legal literature

(A) by a historical review of law;

(B) by describing legislative history; or

(C) by resolving or creating a conflict in the law; or

(v) Reverse a judgment or deny enforcement of an order when the lower court or agency has published an opinion supporting the order.

(2) Unpublished orders:

(i) May be filed after an oral statement of reasons has been given from the bench and may include only, or little more than, the judgment rendered in appeals which

(A) are frivolous or

(B) present no question sufficiently substantial to require explanation of the reasons for the action taken, such as where

(aa) a controlling statute or decision determines the appeal;

(bb) issues are factual only and judgment appealed from is supported by evidence;

(cc) order appealed from is non-appealable or this court lacks jurisdiction or appellant lacks standing to sue; or

(ii) May contain reasons for the judgment but ordinarily not a complete nor necessarily any statement of the facts, in appeals which

(A) are not frivolous but

(B) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance.

While both "opinions" and "orders" are available to the general public by request made of the Clerk of the Court, it is only the former which are published in the Federal Reporter system. The only reference to "orders" allowed, pursuant to Rule 35, §(b)(2)(iii), is their listing in the Federal Reporters' tables of decisions, recording simply affirmance or reversal. See e.g., 534 F.2d 330-31 (7th Cir. 1976).

As for citation, "orders" may not be cited except, as the Rule provides in Section (b)(2)(iv), "to support a claim of *res judicata,* collateral estoppel or law of the case. . . ." This ban on citation extends to all courts within the circuit, and to inclusion in both written documents and oral argument. Rule 35, §(b)(2)(iv).

III.

THE DETRIMENTS IMPOSED BY CIRCUIT RULE 35 SEVERELY OUTWEIGH ITS CLAIMED BENEFITS, AND THUS COMPEL THE RULE'S ABOLITION ON A NUMBER OF NON-CONSTITUTIONAL GROUNDS.

The primary basis for Rule 35 is administrative convenience—the policy underlying the rule is "to reduce the proliferation of published opinions." Rule 35, §(a). As a necessary link in the chain to making this policy effective, the Rule not only restricts those rulings which shall be published, but further imposes a ban on the citation of unpublished "orders."

We do not dispute that there is a serious problem arising from very large federal court caseloads—a problem which, in one aspect, takes the form of overburdening of federal court judges. Nor does amicus dispute the burden placed upon litigants confronted with a steadily growing body of case law to analyze and to thence use or discard, as the case may warrant.

Amicus does dispute any notion that might exist that the no-publication, no-citation rule imposes no costs. Indeed, amicus is firmly convinced that such costs do exist, and that indeed their severity mandates abolition of Rule 35.

While we view Circuit Rule 35 as raising very serious problems under the First Amendment, which we address in Section IV, *infra,* we first address the defects of a non-constitutional nature which Rule 35 embodies. These defects, both singly and in the aggregate, lead to the conclusion that Rule 35 should be abolished by this Court. This Court's authority to order such abolition is grounded on a number of bases—the Rule's exceeding the Court of Appeals' authority; Rule 35's potential conflict with Rule 19 of this Court; and Rule 35's being so damaging as to warrant the exercise of this Court's supervisory authority over the lower federal courts.

A. THE NO-PUBLICATION, NO-CITATION RULE IMPOSES UNEQUAL TREATMENT UPON LITIGANTS.

1. Disparity in Litigants' Access to Unpublished "Orders" Results in Unequal Treatment.

In theory, Rule 35 leaves all litigants in an equivalent posture. None of them may cite unpublished rulings; all of them may obtain these rulings. In practice, the Rule does not work out so neatly.

For the litigant in Chicago, the question of access to unpublished "orders" is one of finding the time and the means to come to the office of the Clerk of the Seventh Circuit Court of Appeals. He may there peruse the files, and select for reproduction at his expense those "orders"

which he finds of some utility. While the system is not a convenient one—given the need to go to the Clerk's office; given the need to pay for "orders" which, were they in a law library, he could use at his library desk free of charge; and given the lack of even the most basic research aid, e.g., a subject matter index—it is perhaps not intolerable.

The litigant located outside Chicago, or the immobilized litigant, stands in a different position. Ordinarily, he could simply consult the law books in the nearest local law library to research his case; indeed, even incarcerated prisoners can do this much. See e.g., *Bounds* v. *Smith,* 45 U.S.L.W. 4411 (April 27, 1977). But obviously use of a law library is unavailing where unpublished "orders" are concerned. The litigant faces the task of traveling from Wisconsin, or southern Illinois or Indiana, to Chicago to simply even read these "orders." The imposition on any litigant—and most particularly the indigent—is apparent. Moreover, the problem of access bears particularly heavily for the immobilized individual—confined by handicap, or more likely institutionalized in a prison or mental institution—who simply does not have the ability to travel to the repository of unpublished "orders."

Thus, while the purport of Rule 35 is to make available to any seeker unpublished "orders", in fact access is really quite problematical.

The problem of availability of "orders" is exacerbated further by the nature of litigants, and of their attorneys. Some attorneys—particularly those employed by the United States Attorney, the state Attorney General, and the Corporation Counsel of the City of Chicago, appear regularly before the Court of Appeals. Their positions provide them, over a period of time, with ready familiarity with

unpublished "orders" of the Court.[16] The litigant or attorney who only rarely appears before the Court, or who does so in successive appeals bearing no relationship to each other in terms of subject matter, is necessarily not going to have the same familiarity with the Court's unpublished "orders."

The ready answer, supposedly, to these disparities of access is invocation of the no-citation portion of Rule 35: if the unpublished "order" cannot be cited, then access to it really is irrelevant because no litigant or attorney 'needs' it anyway.

This answer fails upon analysis, however.

Knowledge of prior rulings—even unpublished ones—can definitively determine whether a litigant will undertake to appeal his case. Knowing of one, or two, or even more unpublished rulings which address the same area of law, if not similar facts, may be sufficient deterrent to expending the time and money which an appeal entails. And of course, to the extent that an institutional litigant possesses a backlog of unpublished rulings, he can more intelligently make those decisions concerning time and money. Indeed, the knowledge of past unpublished decisions can well help a litigant in even deciding whether to initially file suit or, once having so filed, in deciding how to structure the case.

Thus, from the perspective of litigants and attorneys, the existence of unpublished "orders" is not simply an irrelevancy, but is rather a very significant factor in the litiga-

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[16] See, for example, *United States* v. *Erving,* 338 F.Supp. 1011 (W.D. Wisc. 1975), wherein the United States Attorney cited to the district court an earlier unreported ruling of that court which had been subsequently affirmed by unpublished "order" of the Seventh Circuit Court of Appeals.

tion process. And to the extent that by geography or occupation, some litigants have greater access to these "orders" than do other parties, equality is defeated and justice is thereby impaired. This impairment of justice is particularly troubling when it is the Court of Appeals itself which is the agent which, by its Rule 35, generates the opportunity for the disparity of access making a difference. For after all, were all rulings published, all would have access to them, despite geographical and institutional differences.

2. The Use of Unpublished "Orders" Creates the Potential for Different Treatment of Equally Situated Litigants.

It is not inconceivable that different litigants may appear before the courts of the Seventh Circuit presenting very similar—in fact, identical—questions of law. Presumably, were there a guiding appellate court ruling, all the litigants would receive dispositions in conformity with that ruling. But where a relevant Court of Appeals decision is rendered by unpublished "order," there is no ready means to determine whether in such situations the litigants receive uniform treatment. The possibility clearly exists that they will not—different trial courts, or different panels of the appellate court, hearing like cases but unbound by published precedent, may decide the cases differently. To the extent that this differential treatment occurs—indeed, even to the extent that it may possibly occur—equality of treatment is denied.

At least one commentator has pointed to just such inquality. See e.g., Weisgall, "Stop, Search and Seize: The Emerging Doctrine of Founded Suspicion," 9 U. of San Francisco L. Rev. 219, 253-54 (1974). Moreover, the potentiality for such inequality occurring has been raised by at least two litigants within the Seventh Circuit. In *Shear* v. *Richardson,* 364 F. Supp. 43 (S.D. Ill. 1973), the district court had before it a litigant who "(i)n his brief relies heavily upon an unpublished order of the . . . Court of Appeals for the Seventh Circuit. . . ." 364 F. Supp. at 44 n.1. The court responded by stating that "(s)uch reliance is improper" because of the no-publication, no-citation rule. *Ibid.* A similar situation existed in *Do-Right Auto Sales* v. *The United States Court of Appeals for the Seventh Circuit,* ..... U.S. ....., 97 S. Ct. 341 (1976), where the petitioner before this Court sought a writ of mandamus directed to the Court of Appeals arising out of the trial court's having stricken from the record petitioner's reference to an unpublished "order," which the petitioners described in their petition to this Court as being "a ruling 'on all fours' with" their own case. Motion for Leave to File Petition for Writs of Mandamus and Prohibition, Petition for Writs of Mandamus and Prohibition, and Arguments in Support Thereof, at 8.

If indeed the trial courts in *Shear, supra,* and *Do-Right Auto Sales* reached conclusions contrary to those of unpublished decisions 'on all fours,' there is clearly a very serious deprivation of equal treatment. Even if in fact the ultimate results in the two cases were consonant with the unpublished "orders," the potential for inequality demonstrated in the two cases remains. For, after all, few litigants are likely to in fact be aware of such "orders," and thus will not even be able to draw the trial court's attention—or for that matter the appellate court's attention—to a conflicting ruling which, were it published, clearly would control.

B. CIRCUIT RULE 35 IMPAIRS THE DECISION-MAKING PROCESS.

This Court, daily occupied with the obligation of writing opinions which must speak to the great legal issues of our society, hardly needs to be told that the opinion-writing process is a difficult one. Phrasing, explanation, the nuances of language all are critical in the setting down for permanence of the reasoned resolution of a legal dispute. That difficulty—stemming from the care which must be taken in saying exactly what is to be said in the right way, taking into due account the precedents of the past and the impact of today's decision on the future—reflects a fundamental benefit of opinion writing. It exposes the judge's judgment to an exercise whose rigor helps ensure the 'rightness' of his decision. The Court of Appeals for the Fifth Circuit has put the matter well:

> Opinions are to serve a number of purposes, at least two of which are highly significant. One is that an articulated discussion of the factors, legal, factual, or both, which lead the Court to one rather than to another result, gives strength to the system, and reduces, if not eliminates, the easy temptation or tendency to ill-considered or even arbitrary action by those having the awesome power of almost final review. The second, of course, is that the very discursive statement of these articulated reasons is the thing out of which law—and particularly judge-made law—grows. It is an essential part of the process of the creation of principles on which predictions can fairly be forecast as a basis for conduct, accountability, or the like. . . .

N.L.R.B. v. *Amalgamated Cloth. Wkrs. of America, AFL-CIO, Local 990,* 430 F.2d 966, 972 (5th Cir. 1970).

Students of the judicial process, as well as its practitioners, make the same point:

> (T)he necessity for preparing a formal opinion assures some measure of thoughtful review of the facts in a case and of the law's bearing upon them. Snap judgments and lazy preferences for armchair theorizing as against library research and time-consuming cerebral effort are somewhat minimized. The checking of holdings in cases cited, the setting down of reasons in a context of comparison with competing reasons, the answering of arguments seriously urged, the announcement of a conclusion that purportedly follows from the analysis set out in the opinion, are antidotes to casualness and carelessness in decision. They compel thought. It is even necessary that the thought have some of the quality of rigorousness in it. This does not assure that any particular opinion will be a good one, but it does increase the likelihood that it will be fairly good. That is a genuine function of judicial opinions, everyone will agree.

Leflar, "Some Observations Concerning Judicial Opinions," 61 Colum.L.Rev. 810, at 810 (1961).[17]

Rule 35 inexorably leads away from the rigor and discipline which opinion writing imposes, and thus the Rule imperils, for lack of better terminology, 'good' decision-making.

Amicus can anticipate, of course, the assertion that Rule 35 does not curtail writing but only, rather, the publishing of that which is written. Thus, the reasoning goes, the quality of decision-making is not infringed; it is merely the quality of citable opinions which is limited. The assertion fails upon analysis.

That analysis starts with the claim by the Rule's proponents that the Seventh Circuit Court of Appeals indeed does produce, even in its unpublished "orders," reasoned, instructive decisions. For example, Judge Sprecher, testi-

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[17] See also, Llewellyn, *The Common Law Tradition* (1960); Llewellyn, *The Bramble Bush* 159 (1951 ed.).

fying before the Commission on Revision of the Federal Court Appellate System, explained that the Court's "orders" are sufficiently explanatory to "tell the litigants and their counsel exactly what the reasons are for the decision . . .".[18] And his view is supported by another witness before the Commission who observed:

> The practice in the Seventh Circuit is that the order contains a good deal of detail with regard to why the case was decided as it was. It is short on the facts and the factual background, which would help make it relevant in other cases to analogize, but it is instructive as to the participants in that case who know the facts, and they do get an understanding of the thinking that went into making that decision. . . .[19]

A resume of unpublished "orders" at least superficially supports the position that the Court of Appeals is certainly doing more than merely setting down perfunctory statements. Of 65 appeals decided by unpublished "orders" between December 13, 1976 and February 11, 1977, 16 totaled 1 page each, 33 ranged between 2 and 5 pages, 14 ran 6 to 10 pages, and 2 exceeded 10 pages. Indeed, in the very case before this Court, the "order" of the Court of Appeals totals 7 pages.

If it is correct to say that the present activity of the Court by way of its preparation of unpublished "orders" is as substantive as the Commission witnesses maintain, and as the statistics as to page lengths further suggest, then it is difficult to perceive what renders them inadequate for publication. At least in terms of the use of precedent

[18] Commission Hearings, *supra* note 3, Sprecher Testimony, *supra* note 7, at 531.

[19] Commission Hearings, *supra* note 3, Testimony of Irvin B. Charne, Former President, Bar Association of the Seventh Federal Circuit, at 491.

and of the application of legal principles, the unpublished "orders" of the Seventh Circuit compare well with published "opinions."[20] Thus, the argument for non-publication fails if the contention is unblinkingly accepted that unpublished "orders" are indeed comparable in reasoning and explanation to published "opinions."

Obviously, the argument for non-publication is nonetheless made. If we are to accept the assertion made in the context of that argument that unpublished "orders" do save court time—and we add to that assertion the fact that the savings does not come in terms of length of writing—the only savings resulting must flow from time saved in decision-making, rather than in decision writing. This conclusion is even more damning for the continued existence of Rule 35, for impairment of decision-making must mean impairment of justice. This conclusion, moreover, is more than just a matter of logic. We draw it as well from the testimony of Judge Sprecher before the Commission on Revision of the Federal Court Appellate System:

> It takes about 50 per cent of a judge's time to prepare opinions and to read other judges' opinions. If a substantial portion of that time can be conserved by a judge knowing in advance that he (sic) dealing with a non-precedential case, if he can eliminate writing and researching most or all of the facts, which are

[20] See Hastings, *supra* note 5, at 371:

> Another noticeable change has been in the character of our unpublished orders. In most cases they now deal fully with the nature of the appeal, the issues presented, and the reasons and authorities for the rulings made. They have taken on the nature of an unpublished per curiam opinion.

Contra, Report of the Chicago Bar Association Committee on Appellate Court Congestion and Procedure, Chi. Bar. Rec. 16, 20 (July-Aug., 1974).

> known to the parties in any event, and if he can eliminate the difficult process of weighing the facts and applicable law which is essential to a precedent-setting case but not otherwise, he can eliminate the need also for the kind of blending of legal developments from the past to the present that are necessary to develop a precedent, and he can save a tremendous amount of this 50 percent of the case time. . . .[21]

Judge Sprecher speaks of eliminating the "difficult process of weighing the facts and the applicable law." We would suggest that that process is at the very heart of decision-making, and that the elimination of that process cannot but derogate from the 'rightness' of the decision. Legal principles in the abstract are usually clear—it is their application to the facts of a given case which is the very source of litigation, on the one hand, and judicial decision-making on the other. And, at least as we understand our system of case law in this country, it is the slow accretion of decisions applying these principles to different sets of facts—sometimes factual patterns very similar to their predecessors—which make for the continuing growth of the law and for the responsiveness of seemingly settled principles to new conditions.

Judge Frank, while writing in the context of Federal Rule of Civil Procedure 52's requirement that district courts enunciate their findings of facts and conclusions of law, cogently stated the essential nature of that judicial "weighing (of) the facts and the applicable law" which Judge Sprecher addressed:

> An impeccably "right" legal rule applied to the "wrong" facts yields a decision which is as faulty as one which results from the application of the "wrong" legal rule to the "right" facts. . . . (A)s every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that . . . the facts are thus-and-so gives way when it comes to expressing that impression on paper. . . .

United States v. *Forness,* 125 F.2d 928, 942-43 (2nd Cir. 1942), cert. denied, 316 U.S. 694 (1942). As former Arkansas Supreme Court Justice Leflar wrote: "(T)he necessity for preparing a formal opinion assures some measure of *thoughtful review of the facts in a case and the law's bearing upon them.*" Leflar, "Some Observations Concerning Judicial Opinions," *supra,* at 810 (Emphasis added).

In sum, Rule 35 does exact a heavy toll. It removes from judges that very burden of careful, rigorous consideration which 'good' decision-making demands.

C. CIRCUIT RULE 35, WHILE BARRING LITIGANTS FROM CITING UNPUBLISHED "ORDERS," LEAVES THE COURTS FREE TO UTILIZE THEM IN A SUB SILENTIO MANNER—A RESULT DETRIMENTAL TO JUST DECISION-MAKING.

On its face, Rule 35 purports to bar litigants from citing to the courts of the Seventh Circuit unpublished "orders." In amicus' view, this Rule imposes serious inequity upon the litigant, Section IIIA, *supra,* and seriously undermines the decision-making processes of the Court of Appeals, Section IIIB, *supra.* The Rule has a third pernicious consequence: it allows the courts to in fact rely upon the very "orders" whose precedential bearing the Rule disclaims. In brief, the courts can rely upon orders which litigants cannot cite, to which they cannot respond, and of which they are even likely to be unaware.

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[21] Commission Hearings, *supra* note 3, Sprecher Testimony, *supra* note 7, at 530.

United States v. *Rosciano,* 499 F.2d 173 (7th Cir. 1973), bears out this assertion, as does Judge Sprecher's testimony before the Commission on Revision of the Federal Court Appellate System, discussed *infra* in this section. In *Rosciano,* then-Judge Stevens dissented, along with Judges Swygert and Sprecher, from an en banc ruling. Seeking to make his point in the dissent, Judge Stevens apparently felt that a prior dissent of his, in an unpublished ruling, was relevant. Thus, "(i)n order to avoid what might otherwise be a violation of sub-paragraph (4) of our present Circuit Rule 28 (now superseded by Rule 35)," he published "a copy of . . . (his) dissent in the (unpublished) *Fawcett* case as an appendix to this opinion (in *Rosciano*). . . ." 499 F.2d at 176 n.4.

Obviously, whatever the knowledge of the government's attorney, or of Mr. Rosciano's, at least one judge sitting on the en banc Court knew of the instruction provided by an unpublished "order." Fortunately, that judge specifically invoked the unpublished decision, thus at least providing the litigants an opportunity to understand better the dissenters' reasoning and to cite that reasoning to this Court, were a certiorari petition to be filed.

It is hardly surprising that sitting judges know of unpublished "orders". After all, they will themselves have written them. Unless each judge's mind is a *tabula rasa* for each new case he hears, the words of his own past are hardly going to remain secreted. That is just a statement of human existence. But there is more as well, going not so much to the marvels of memory as to the working of human nature. Without faulting any judge's integrity, it is at least not beyond the pale of mention to suggest that a judge who has ruled one way in a past, unpublished "order" may feel some pressure to rule the same in a similar

case now before him. For that matter, peer pressure and the desire to maintain institutional solidity may incline him to rule today in a way which comports with a fellow judge's unpublished ruling of yesterday.[23]

The internal use—apart from internal knowledge—of unpublished rulings is borne out further by the testimony of Judge Sprecher before the Commission on Revision of the Federal Court Appellate System. The judge's colloquy with the members of the Commission suggests the possibility that unpublished "orders" could be used by the court as something which Judge Sprecher terms "non-precedential precedent(s):"[24]

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[23] We by no means suggest that this obeisance to the past is inevitable, but certainly it is possible. An interesting example of the situation is provided in *United States* v. *Joly,* 493 F.2d 672 (2nd Cir. 1974). In response to the appellant's argument, the government urged that "two prior decisions of . . . (the Court), on all fours with this one, foreclose the issue." 493 F.2d at 675. The cases cited, the Court explained, "were both affirmances from the bench by different panels of this court." 493 F.2d at 675. In light of their falling within the purview of the Second Circuit Court of Appeals' no-publication, no-citation rule, the Court rejected the government's reliance upon them. It then proceeded to reject the appellant's substantive argument.

While we would not suggest that the Second Circuit Court of Appeals in fact relied upon its earlier unpublished decisions, we would suggest that their very existence—in this instance somehow known to one of the litigants—would at the least have exerted some pressure on the Court—if not to rule similarly in *Joly,* to at least make some effort to distinguish the now-public unpublished decisions.

[24] Commission Hearings, *supra* note 3, Sprecher Testimony, *supra* note 7, at 537.

JUDGE ROBB: Judge, do you have any system of assuring yourselves that there is no conflict intra-court in your unpublished opinions?

. . .

JUDGE SPRECHER: It worries me . . . because what we are going to have to do now, I think, and this is probably the next step, we are going to have to have some kind of an intracourt index of unpublished opinions, indexed according to the subject matter and so forth. These matters are going to have to be available for the court, even though they cannot be cited by the court or to the court.

I see nothing underhanded about something like that. It just means that internally we will be consistent and that different panels of the court in unpublished orders are not coming out with different results at the same time, or even at different times.

To me, the biggest argument against the people who say citation should be allowed is to permit the court to have full availability and use of its opinions for its own intra-court procedures, but without citing them to the outside world because they are not precedential. It is just a matter of consistency so that there are no aberrations.

Further on, Judge Sprecher continued:

> I think all I am speaking about is--I am talking about a non-precedential precedent, because I am talking about aids to future production of opinions and not their use as precedents in the stare decisis sense.[25]

Obviously—as further portions of the colloquy not excerpted here emphasized—[26] there is a very fine distinction—indeed one so fine that it is virtually ephemeral—between a precedent which is a precedent, and a precedent which is usable but, because not published, is a "non-precedent."

[25] Commission Hearings, *supra* note 3, Sprecher Testimony, *supra* note 7, at 536-39.

[26] See e.g., statements of Francis R. Kirkham and Dean Roger C. Cramton, both members of the Commission on Revision of the Federal Court Appellate System, Commission Hearings, *supra* note 3, at 536-39.

Apart from the use within the Court of Appeals itself of unpublished "orders," there is the further problem—perhaps an even more severe one, of their impact upon federal trial court judges within the Circuit. Unpublished "orders" are freely available, albeit not published. It certainly is not impossible that a trial court judge will become aware—either through his own research or through other means—of "orders" relevant to a case before him. Indeed, that very awareness is explicitly established in a number of district court opinions. See e.g., *United States* v. *Erving,* 388 F. Supp. 1011, 1017 (E.D. Wisc. 1975); *United States* v. *Feinberg,* 371 F. Supp. 1205, 1214 (N.D. Ill. 1974).

In *Erving* the trial court judge specifically disclaimed reliance upon the appellate court's unpublished "order," in light of the Circuit no-publication, no-citation rule. In *Feinberg,* the trial court judge did the same, but he also engaged in considerable discussion of the unpublished "order", even though recognizing that under the Circuit Rule it had no precedential value and despite admonishing the attorney citing the case to "honor the rule." 371 F. Supp. at 1214 n.9.

Given a trial court's awareness of a prior unpublished decision by the Court of Appeals, given the press for institutional conformity, and given the institutional pressure to hand down decisions which accord—in traditional stare decisis fashion—with those of higher courts, there is clearly the danger that the trial court will indeed follow an un-

published "order", even in instances where counsel themselves are unaware of it.[27]

While one may conclude that internal use by courts of appeals and district courts of unpublished "orders" is not good, and further suggest that it is enough to simply state that conclusion emphatically, it is difficult to firmly conclude that that statement can override human nature and the pressure for institutional conformity. So long as past rulings exist—whether they are published or not—they are likely to have a force of their own on the appellate court and on the lower courts. The question is whether litigants shall be allowed to openly see and understand that force, and use those cases which the courts themselves consciously or unconsciously already are using. We think the answer to that question must be in the affirmative—and this answer means the abolition of Rule 35. Were all rulings published and citable, litigants and courts would be operating at an equal plane.

D. ON ITS FACE, AND AS APPLIED, CIRCUIT RULE 35 FAILS TO PROVIDE ADEQUATE ASSURANCE THAT SIGNIFICANT RULINGS ARE PUBLISHED.

While attempting to establish a coherent system for publication, Rule 35 does not address a number of matters seemingly relevant to the determination whether to publish or not, and thus to the correlative consequence of availability for citation.

Rule 35, for example, embodies no requirement that decisions in which appears a dissenting opinion be published,

[27] See Report of the Chicago Bar Association Committee on Appellate Court Congestion and Procedure, Chi. Bar Rec. 16, 20 (July-Aug., 1974).

notwithstanding that seemingly the existence of a dissent would suggest that the ruling is not so straightforward as a determination not to publish would suggest.[28] Indeed—and without commenting on their substance, amicus would note that the Seventh Circuit Court of Appeals has issued a number of unpublished "orders" in which a member of the panel has dissented.[29]

Rule 35 further embodies no requirement that reversals be published, except insofar as such reversals fall within the terms of its 1976 amendment.[30] Nor is there any requirement that rulings following from unpublished lower court decisions be published. The consequence of this latter silence on the part of Rule 35 is that in this petition before this Court, the public apparently has virtually no way of knowing what it is that the Court will be addressing save

[28] Rule 35 recognizes the right of a single judge to make his opinion available for publication, but "it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish." §(d)(2). The Chicago Bar Association Committee on Federal Civil Procedure urges that "where a judge writes a dissenting opinion, the majority should be required to publish its opinion along with the dissent." Commission Hearings, *supra* note 3, at 615.

[29] See e.g., *United States* v. *Dema*, No. 75-1894 (Oct. 7, 1976) (Markey, J., dissenting); *Doyle* v. *Unicare Health Facilities*, No. 75-1530 (Sept. 14, 1976) (Fairchild, J., dissenting); *United States Steel Corp.* v. *Environmental Protection Agency*, No. 76-1715 (Sept. 10, 1976) (Pell, J., dissenting). These three cases are drawn from amicus' review of unpublished decisions handed down by the Seventh Circuit Court of Appeals between December 13, 1976 and February 11, 1977. For a particularly long dissent in an unpublished "order," see *Impeach Nixon Committee* v. *Buck*, 498 F.2d 37 (7th Cir. 1974), discussed *infra* in this section.

[30] See note 4, *supra*.

from the questions certified, since the trial court opinion is unpublished, and so too is the Court of Appeals' "order."

Rule 35 also makes no distinction between perfunctory rulings, and those which—at least in terms of length—suggest the significance of "opinions."[31] The consequence of this lack is that a number of unpublished "orders" run to a considerable number of pages.[32]

Above and beyond these individual gaps in Rule 35, there is the even larger problem inherent in any censoring system which seeks to censor on the basis of prediction. Rule 35's standards for publication contemplate that only certain rulings will be published: those, for example, which "(e)stablish a new or change an existing rule of law;" which "(i)nvolve an issue of continuing public interest;" which "(c)riticize or question law;" or which "(c)onstitute a significant and non-duplicative contribution to legal

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[31] Of course, even a very perfunctory statement by the Court may have significant consequences. For example, in 1974 the Court of Appeals issued a long opinion in *Brubaker* v. *Board of Education*, 502 F.2d 973 (7th Cir. 1974), cert. denied, 421 U.S. 965 (1975). Subsequently, the en banc Court reheard the case. It split 4-4, the consequence being that it deemed the original panel ruling functus officio. The en banc Court did not publish an order so stating, however. Subsequently, a law review article running 28 pages was written with *Brubaker* as its primary focus, the author being unaware that the panel ruling had been rendered functus officio. "Brubaker v. Board of Education: Teach Dismissals for Use of Objectionable Material in the Classroom," 7 Conn. L. Rev. 580 (1975). Only thereafter did the Court issue as a published "opinion" the conclusion of the en banc Court, at 527 F.2d 611 (7th Cir. 1975).

[32] See text following note 19, *supra*.

literature (A) by a historical review of law; (B) by describing legislative history; or (C) by resolving or creating a conflict in the law; . . ." Rule 35, §(c).

Despite the effort to establish a coherent set of guidelines, by the very nature of things prediction must at times err. What seems today to be neither "new" nor a "change" in existing law may well, in hindsight, appear to be the contrary. Indeed, on a number of occasions the Court has subsequently published opinions which initially were issued as "orders," clear indication of a changed perception of the significance of the decision in retrospect. See e.g., *United States* v. *Balanow*, 528 F.2d 923 (7th Cir. 1975); *Johnson* v. *Holley*, 528 F.2d 116 (7th Cir. 1975); *Encyclopedia Britannica, Inc.* v. *F.T.C.*, 517 F.2d 1013 (7th Cir. 1973); *Brennan* v. *Local 441*, 486 F.2d 6, 7 (7th Cir. 1973).

Perhaps the most dramatic example of the failure of the predictive guidelines of Rule 35 to adequately forecast the importance of a decision is provided by the checkered history of what has now been published at 498 F.2d 37—a 1974 Seventh Circuit Court of Appeals ruling captioned *Impeach Nixon Committee* v. *Buck*. By unpublished memorandum opinion, the federal district court had denied an injunction ordering the public mass transit agency in Chicago to sell to a citizens group space on its vehicles for the presentation of a public message. The agency already in fact sold space to political candidates and to other disseminators of public messages.

The Court of Appeals reversed—in an unpublished "order" consisting of a two-page majority ruling, and accompanied by a 17-page dissent by Judge Pell. Subsequently, this Court on May 13, 1974 issued a stay of the appellate court order. Later still, the full Court—some six months after the Seventh Circuit ruling, granted certiorari, re-

versed, and remanded for reconsideration in light of *Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974), and to ascertain whether the case was moot in light of President Nixon's resignation. *Buck* v. *Impeach Nixon Committee,* 419 U.S. 891 (1974). The Court of Appeals then—again by unpublished "order"—remanded, directing dismissal of the case on grounds of mootness. *Impeach Nixon Commitee* v. *Buck,* 506 F.2d 1405 (7th Cir. 1974) (table). Only after all this had occurred did the Court of Appeals reverse its 'housekeeping' determination and issue its months-old initial ruling as a publishable "opinion."[33]

It is difficult to understand how a case which brought forth a stay and then a reversal by this Court, as well as a 17-page dissent by a member of the appellate court panel itself, could be deemed unworthy of publication. Apart from the significance of the technical legal issues, the case's significance was enhanced by the very political controversy involved—e.g., the impeachment of the president. And apart from that controversy, the issue of the use of the public buses and trains in Chicago as public fora certainly seems one of concern and interest to the public.

Another example of changed perceptions in retrospect is provided by *Bach* v. *Bensinger,* 504 F.2d 1100 (7th Cir. 1974). That decision made new law in the Seventh Circuit, the Court of Appeals holding for the first time that a prisoner is entitled to be present during the opening of legal mail addressed to him in prison. Notwithstanding the assumed insignificance of the decision—given that it was issued in an unpublished "order", the Illinois Attorney General sought review in this Court. After certiorari was

[33] Commission Hearings, *supra* note 3, Lassers Testimony, *supra* note 3, at 556.

denied, 418 U.S. 910 (1974), plaintiff's counsel requested the Court of Appeals to re-issue its "order" as an "opinion," and that was done.

Several more examples emphasize the problem of prediction. The testimony of the vice-chairman of the Chicago Bar Association's Committee on Federal Civil Procedure before the Commission on Revision of the Federal Court Appellate Court System discusses one instance—*Brainert* v. *Beal;* No. 73-1382:

> (I)t is probably one of the most insignificant decisions as far as the court is concerned.
>
> However . . . (a member of our committee) felt that it had great significance due to the fact the court in this case held that a docket entry by a district court could not be disputed by affidavits, even of the clerk himself.
>
> The court in this decision cited a Tenth Circuit decision as authority for their holding. It would seem without any research that this was probably a case of first impression in this circuit, and if an attorney in the future should have a situation as such, he is not going to be able to find this case. Furthermore, he is not going to be able to cite this case as authority. . . .[34]

The same witness addressed *Ward* v. *United States,* No. 72-1215 (June 12, 1973), listed in the table of unpublished orders at 478 F.2d 1405 (7th Cir. 1973). In that decision, the Court noted, to quote the report submitted by the witness:

> that a decision by the Court of Appeals for the Eighth Circuit appeared to be contrary to the holding in this case, and so this court said that it must disagree with the Eighth Circuit's interpretation of a controlling

[34] Commission Hearings, *supra* note 3, at 608, Testimony of Maurice P. Raizes.

> Supreme Court decision relating to self-incrimination. . . .[35]

Similarly, another witness before the Commission on Revision of the Federal Court Appellate System reported another unpublished "order," *Federoff* v. *Parsons,* No. 74-1089, describing it as a "case (which) raised important issues of *res judicata* in a case involving claims against the reinsurer of an insolvent insurance company."[36]

Finally, the case now before this Court demonstrates a significant ruling issued by "order." Whatever ultimate conclusion this Court reaches as to the issues raised, it is obvious that those issues—as resolved by the Court of Appeals—are sufficiently important to warrant this Court's attention.

Significant decisions which go unreported have a number of adverse consequences. First, their absence from the reporters impairs the development of doctrine—litigants, courts of the Circuit, and other courts outside the Circuit are deprived of the reasoning and holdings of these rulings.[37] Second, the failure to report significant decisions

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[35] Commission Hearings, *supra* note 3, at 613, Report on Seventh Circuit Court of Appeals Rule 28, CBA Committee on Federal Civil Procedure, submitted by Maurice P. Raizes.

[36] Commission Hearings, *supra* note 3, Lassers Testimony, *supra* note 3, at 556.

[37] See Weisgall, "Stop, Search and Seize: The Emerging Doctrine of Founded Suspicion," 9 U. of San Francisco L. Rev. 219, 253-54 (1974), discussing the confusion in the law of the Ninth Circuit arising from a number of unpublished rulings being inconsistent with published opinions; "Publish or Perish: The Destiny of Appellate Opinions in California," 13 Santa Clara Lawyer 756, at 756 (1973), citing an important unreported decision of a California state court; comments of Dean Cramton, Commission Hearings, *supra* note 3, at 491, discussing a series of important unreported California state rulings; Gardner, "Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?," 61 A.B.A.J. 1224 (1975).

encourages further litigation, burdening both the courts thereby and causing litigants to undertake needless expense. To this problem the Report of the Chicago Bar Association Committee on Appellate Court Congestion and Procedure addressed itself:

> One example is a recent group of cases before the Seventh Circuit Court of Appeals involving the question whether an order dismissing class allegations in a proposed class action under Federal Rule 23 was an appealable order. The Seventh Circuit ruled (in three consolidated cases (footnote omitted)) without publishing its opinion, that such an order was not appealable. Other courts of appeals had held such orders appealable. (Footnote omitted). Further appeals were taken in the Seventh Circuit until a memorandum was published. (Footnote omitted). Subsequent appeals may not have been taken if the first order had been published. (Footnote omitted).

Chi. Bar Rec. 16, 21 (July-Aug., 1974). Third, unreported significant decisions—or for that matter seemingly insignificant ones—may have the result of producing unequal treatment among litigants. See Section IIIA, *supra.*

We concur in the observations of Mr. Justice Stevens, addressing the Illinois State Bar Association's Centennial Dinner in Springfield, Illinois, on January 22, 1977:

> . . . (A) rule which authorizes any court to censor the future citation of its own opinions or orders rests on a false premise. Such a rule assumes that an author is a reliable judge of the quality and importance of his own work product. If I need authority to demonstrate the invalidity of that assumption, I refer you to a citizen of Illinois who gave a brief talk in Gettysburg, Pennsylvania that he did not expect to be long remembered. Judges are the last persons who should be authorized to determine which of their decisions should be long remembered.

There is seemingly only one response to Mr. Justice Stevens, and to the apparent mistakes made in determining —at least initially—not to publish rulings such as *Impeach Nixon Committee* v. *Buck, supra.* That is reliance upon the ability of "(a)ny person . . . (to) request by motion that a decision by unpublished order be issued as a published opinion." Rule 35, §(d)(3). Yet reliance upon this ostensible option is hardly satisfactory.

If the litigants in a given appeal are themselves content to leave it unpublished, there may well be slim likelihood that anyone else who might be interested in its publication will even be aware of the decision. Even if the litigant—or some other knowledgeable party—moves for publication, he still carries the burden of convincing the Court of Appeals by his motion that indeed the decision is "consistent with the (very) guidelines for disposition of appeals as set forth in . . . (the) rule" which the Court has already once determined do not in fact warrant publication. Rule 35, §(d)(3). Finally, a third flaw in reliance upon Section (d)(3) of Rule 35 lies in the dubious ability of a losing movant to successfully secure review of his motion's denial here. A pragmatic assessment leads to the conclusion that this Court is unlikely to undertake to start considering such denials by the Court of Appeals, given its already overburdened state and given further the standards of Rule 19 of this Court.

E. CIRCUIT RULE 35 IMPAIRS THE ABILITY OF LITIGANTS TO SECURE EFFECTIVE CONSIDERATION IN THIS COURT.

Amicus need hardly inform this Court of the increasing number of petitions and appeals filed herein. And amicus cannot from first-hand knowledge tell this Court how it functions when it renders decisions concerning granting

certiorari petitions and noting probable jurisdiction. Nonetheless, in amicus' view Circuit Rule 35 impairs the ability of litigants to obtain as full a review as they might otherwise secure.

One aspect of this impairment flows from inter-Circuit conflicts being obscured by unpublished "orders." Rule 19 of this Court sets down as one basis for considering the grant of certiorari petitions conflicts between Circuit rulings. Yet, by virtue of Rule 35, an "order" conflicting with a published decision of some other circuit is very unlikely to be known to the litigant in that circuit. Thus, the problem of conflict remains hidden.

Amicus recognizes that since "orders" are not precedential, 'true' conflict may not exist. Pragmatically, however, the conflict is there. And because "orders" are so meaningful, notwithstanding their non-citability, see Sections IIIA-D, *supra,* and IIIF, *infra,* that conflict is meaningful.

Moreover, the very fact that the rule is invoked by the Court of Appeals so as to bar publication of a decision is a signal that the case—at least in the view of the appellate court—is not important. We would suggest that this signal does not go unnoticed in this Court, even admitting that the signal may at most register subliminally.

Finally, the very cursory nature of unpublished "orders" has negative consequences. As Judge Sprecher explained in his testimony before the Commission on Revision of the Federal Court Appellate System, by the use of "orders" the Court can "eliminate writing and researching most or all of the facts."[38] Yet it may be that

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[38] Commission Hearings, *supra* note 3, Sprecher Testimony, *supra* note 7, at 530.

very treatment of the facts which is critical to an adequate assessment by this Court of the lower court decision's accuracy. This is particularly borne out by *Will* v. *United States,* 389 U.S. 90 (1967), involving a federal district court judge's order regarding the furnishing by the government in a criminal case of certain information to the defendant.

After Judge Will indicated his intention to dismiss the indictment because of the government's refusal to comply with his order, the Seventh Circuit Court of Appeals issued, without any opinion, a writ of mandamus directing him to vacate his order. This Court vacated the Seventh Circuit writ. In so doing, the Court, while in part directed by its reluctance to acquiesce in the drastic remedy of mandamus, was apparently most confounded by failure of the appellate court to justify issuance of the writ. The Court found a "failure of the Court of Appeals to attempt to supply any reasoned justification of its action," 389 U.S. at 104, and went on to state:

> (W)ithout an opinion from the Court of Appeals we do not know what role, if any, this factor (of an appellate court's familiarity with the practice of the district courts within the circuit) played in the decision below. In fact, we are in the dark with respect to the position of the Court of Appeals on all the issues crucial to an informed exercise of our power of review. We do not know: (1) what the Court of Appeals found petitioner to have done; (2) what is objected to in petitioner's course of conduct—. . . . We cannot properly identify the questions for decision in the case before us without illumination of this unclear record by the measured and exposed reflection of the Court of Appeals. 389 U.S. at 105-107.

What makes *Will* particularly apposite to cases decided by unpublished "orders" is that these cases—according

to the description offered by Judge Sprecher—are particularly sparse in terms of addressing of the factual matrix. It is exactly that missing factual analysis which the *Will* Court found so disabling in terms of allowing effective review of the appellate court ruling. That same missing analysis must mitigate against effective appreciation here of decisions handed down in unpublished "orders."

F. CIRCUIT RULE 35 AT THE LEAST PRODUCES AN APPEARANCE OF INJUSTICE.

Overriding the individual pernicious consequences which flow from Rule 35, there is the further injury done to the appearance of justice by the Rule. It may be that the Rule does not impair the quality of decision-making—assuming there were some quantifiable means to measure "quality." It may be that in fact the courts of the Seventh Circuit are very careful about blanking out from their minds unpublished "orders". It may be that this Court is able to adequately appraise the significance of "orders" coming before it by way of petitions for writs of certiorari. But even were all these 'maybe's' so, that would not detract from the appearance of secrecy which remains.

Secrecy in government is a commonplace shibboleth of the times. We do not suggest that this Court should cater to passing public fancies. But we do urge this Court to recognize that the public courts of the land—at least those in the Seventh Circuit—operate under a system which bars the public business of the courts from effective public view, and which bars litigants from use of what they may deem to be important rulings. As Mr. Justice Frankfurter wrote for the Court in *Offutt* v. *United States,* 348 U.S. 11, 14 (1954): "(J)ustice must satisfy the appearance of justice." Not only must the courts know that what they are doing is fair; the public must share that perception. "(T)he pub-

lic must be satisfied that fairness dominates the administration of justice." *Adams* v. *United States ex rel. McCann,* 317 U.S. 269, 279 (1942).

We do not think the appearance of justice is served by Rule 35.

G. BECAUSE OF ITS DEFECTS, CIRCUIT RULE 35 MAY BE STRUCK DOWN BY THIS COURT ON NON-CONSTITUTIONAL GROUNDS

The Court of Appeals' power to issue Rule 35 derives from the statute empowering all courts to "prescribe rules for the conduct of their business," 28 U.S.C. §2071, and the parallel authorization of Circuit rulemaking in the Federal Rules of Appellate Procedure, Rule 47.[39]

Possession of power does not warrant its abuse, nor action exceeding it. Rather, the rulemaking power is limited by a spectrum of weighty constraints, ranging from prudential limits to constitutional limitations. We will discuss the constitutional flaws of Rule 35 in Section IV, *infra.* Here we are concerned with limits to rulemaking power short of invocation of the Constitution.

This Court, by virtue of its ultimate supervisory authority over the lower federal courts, has the authority to negate rules—such as Circuit Rule 35—which exceed the authority of the court promulgating them, or which under-

[39] There also exists an inherent power "necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link* v. *Wabash R. Co.,* 370 U.S. 626, 630-31 (1962). This inherent power is subject to the same sorts of limitations constraining the courts' statutory and Rule 47 powers. See e.g., *Link, supra,* at 629-31; *Pan American World Airways, Inc.* v. *U.S. District Court,* 523 F.2d 1073, 1077 n.3, 1078 (9th Cir. 1975).

mine the administration of justice. See e.g., *Communist Party* v. *Subversive Activities Control Board,* 351 U.S. 115, 124 (1956); *McNabb* v. *United States,* 318 U.S. 332, 340 (1942). Cf. *Rodgers* v. *United States Steel Corp.,* 508 F. 2d 152, 163 (3rd Cir. 1975), cert. denied, 423 U.S. 832 (1975); *Sanders* v. *Russell,* 401 F.2d 241, 244 (5th Cir. 1968). Rule 35 is simply too ambitious an exercise of local rulemaking power, even if a no-publication, no-citation rule might properly be incorporated in the Federal Rules of Procedure. In *Miner* v. *Atlass,* 363 U.S. 641, 650 (1960), by way of example, this Court struck down a local rule permitting depositions in admiralty cases, perceiving this rule as instituting an example of what the Court described as "basic procedural innovations." Circuit Rule 35, rejecting a long tradition in this country of publishing appellate court opinions and honoring their citation by litigants, is just such an innovation.[40]

[40] In *Colgrove* v. *Battin,* 413 U.S. 149, 163 n.23 (1973), the Court held that a local rule's requirement of a six-member jury was not a "basic procedural innovation" under *Miner* because it did not "bear upon the ultimate outcome of the litigation." In contrast, as suggested by our arguments *supra,* Rule 35 may be at least as outcome-determinative as the discovery depositions involved in *Miner.* It may prevent a court from learning of and thus from following precedent "on all fours"; it may give institutional litigants an outcome-determinative advantage over other litigants; and it may encourage outcome-determinative shortcuts in the court of appeals' legal and factual analysis. It cannot be said of no-publication rules, as this Court said of six-member jury rules, that they "plainly" do not bear on the ultimate outcome of the litigation. In *Colgrove* the Court also noted an alternative, primary ground of decision in *Miner,* and declined to consider a suggestion that *Miner* "should be read to hold that all 'basic procedural innovations' are beyond local rulemaking power and are exclusively matters for general rulemaking." *Id.* We urge no such expansive reading of *Miner,* but only that Seventh Circuit Rule 35 is too jurisprudentially and constitutionally sensitive for the local rulemaking process.

A second basis for the striking down of Rule 35 on non-constitutional grounds exists. The Rule undermines the administration of justice.[41] It produces a number of adverse consequences, all detrimental to the operation of the federal court system. The supervisory authority of this Court, operating solely within the federal judiciary and relatively free of restraints of comity and federalism, applies here and indeed is uniquely suited to the task of "confining the (lower) court to the proper sphere of its lawful power." *Rodgers* v. *United States Steel Corp., supra,* at 162.

Apart from the matter of Circuit Rule 35's being in excess of the Court of Appeals' rulemaking power and its undermining the administration of justice, there is the further defect following from the Rule's inconsistency with Rule 19 of this Court. 28 U.S.C. § 2071 requires that local court

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[41] See e.g., *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, 124-5 (1956) ("fastidious regard for the honor of the adminstration of justice"); *Bartone* v. *United States*, 375 U.S. 52, 54 (1963); *Elkins* v. *United States*, 364 U.S. 206, 216 (1960); *Marshall* v. *United States*, 360 U.S. 310, 313 (1959); *Cicenia* v. *LaGay*, 357 U.S. 504, 508-09 (1958); *Gay* v. *United States*, 411 U.S. 974, 36 L.Ed.2d 697, 698 (1973) (Douglas, J., dissenting) (four-Justice dissent from denial of certiorari). Although the supervisory power does not appear to have been the controlling factor in any recent decisions, it has been recently affirmed, both explicitly, *Stone* v. *Powell*, 428 U.S. 465, 481 n.16 (1976), and implicitly, *United States* v. *Janis*, 428 U.S. 433, 445 (1976); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 451 (1971).

While it has generally been invoked in criminal cases, the Court's supervisory power was extended in *Communist Party, supra,* to administrative proceedings subject to federal appellate review by statute. In *Sanders* v. *Russell*, 401 F.2d 241 (5th Cir. 1968), the Court of Appeals invoked its supervisory power over district courts to invalidate the application of a local rule in a civil matter. See also, *Farmer* v. *Arabian Oil Co.*, 285 F.2d 720, 722-23 (2nd Cir. 1960).

rules be consistent with "rules of practice and procedure prescribed by the Supreme Court." A local rule which is inconsistent with the policy of a higher court's rule, or a general rule applicable to all federal courts, must fall. See e.g., *Rodgers* v. *United States Steel Corp., supra,* at 163.

Here, Rule 35 camouflages inter-Circuit conflicts. For example, as quoted earlier in Section IIID, the Report of the Chicago Bar Association Committee on Appellate Court Congestion and Procedure noted that the Court of Appeals for the Seventh Circuit issued an unpublished "order" holding that trial court orders dismissing class action allegations are not appealable, and that this conflicted with the holdings of other Courts of Appeals. Chi. Bar Rec. 16, 21 (July-Aug., 1974) While the litigants in the Seventh Circuit might have been able to learn of the conflict, given the published rulings of the other Circuits, a litigant in one of the other Circuits would not have been able to do so, given the fact that the Seventh Circuit Court of Appeals' contradictory ruling was unpublished and therefore almost certainly unknowable by a litigant hundreds of miles away, in another Circuit. Such a situation cuts against Rule 19 of this Court, which lists inter-Circuit conflict among the reasons considered in granting petitions for writs of certiorari.

IV.

CIRCUIT RULE 35 VIOLATES THE FIRST AMENDMENT.

Wholly apart from the narrower, non-constitutional defects of Rule 35, the Rule also raises particularly troubling concerns in light of the press of the First Amendment. The Rule trenches severely on the ability of litigants, attorneys and the public to acquire information about the performance of its judiciary in general, and about the judiciary's

resolution of specific disputes in the particular. It further imposes a barrier to communication by undermining the ability to usefully disseminate this information, even if it is somehow acquired. And the Rule compounds its vices by vagueness.

A. THE ACTIVITIES OF THE FEDERAL COURTS ARE INHERENTLY SUBJECT TO PUBLIC SCRUTINY.

Ours is a society committed to open government. That commitment does not falter when it is the courts which are exposed to scrutiny, as opposed to the other branches of government. Thus, this Court has written:

> A trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. *Those who see and hear what transpired can report it with impunity.* There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

Craig v. *Harney,* 331 U.S. 367, 374 (1947), with emphasis added by the Court, quoting verbatim in *Cox Broadcasting Corporation* v. *Cohn,* 420 U.S. 469, 492-93 (1975).

Litigants come into the courts of the land—both trial courts and those on the appellate level—not seeking any private advice, but with the full force of the historic tradition that our courtrooms are—indeed must be to preserve justice—open and public. The briefs which attorneys file are, with rare exceptions, matters of public record. Argu-

ments before the courts are open to any who may wish to enter the courtroom—again with very rare exceptions.

Thus, at least so far as those who provide the grist for decision-making are concerned, they have entered into no pact with the Court of Appeals to quell speech. Yet Rule 35 indeed does restrict speech, by denying publishability to a large number of decisions, and by further denying citation of those unreported rulings. The Court has muted its own voice, and even more, muted that of those who hear the Court's voice and want to echo it back to the courts. In so doing, the Court disserves the very public function it serves. As former Arkansas Supreme Court Justice Leflar has written:

> Judicial opinions are the voices of our courts, and they serve the purposes that the courts serve. Stated most broadly, those are the purposes of government itself, though not all the purposes of government. Opinions are the public voice of appellate courts, and so represent the judiciary to the public, but they are not voices merely. They are what courts do, not just what they say. They are the substance of judicial action, not just news releases about what courts have done, though they have that function too.

Leflar, "Some Observations Concerning Judicial Opinions," 61 Colum. L. Rev. 810, 819 (1961).

B. CIRCUIT RULE 35 TRENCHES UPON THE FIRST AMENDMENT BY INFRINGING THE RIGHT TO KNOW IMPLICIT WITHIN THE FIRST AMENDMENT.

Only last Term this Court confirmed that there is, within the coverage of freedom of expression, the right to receive information. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976). In so doing, the Court was addressing the right of consum-

ers to obtain information regarding the pricing of prescription drugs, a right impaired by a state law banning advertisements providing such information.

Certainly no one would contend that the rulings of federal courts of appeals are tantamount to commercial advertising. The absurdity of the comparison, however, only highlights the constitutional anomaly whereby the First Amendment protects the right of the consumer to secure information about the price of medicines—and thence to disseminate that information to whom he will—while, unless the Court rejects Rule 35, that Amendment excludes from its ambit the decisions of the second highest federal court of the land.

Granted, there are two distinctions between the Virginia statute and Rule 35 which go beyond the specifics of the information at issue. For one, Circuit Rule 35 does not totally bar disclosure of the information. Rather, it precludes formal publication, and thence dissemination of that information, in the courtroom only. And second, the Court of Appeals, unlike presumably pharmacists in Virginia (although the pharmacists in fact were not even parties in *Virginia State Board of Pharmacy*), is not a totally willing speaker.

These distinctions, however, do not make a difference. Concededly, Circuit Rule 35 does not preclude any member of the public from obtaining a copy of an unpublished "order." Nor does it bar the media from reporting on that "order." Pragmatically, the Rule goes far towards achieving these ends, however. Since the Court bars its own publication of "orders," as well as publication by the Federal Reporters, the public and litigants must rely upon fortuitously learning of these rulings. In most instances,

that means the public and litigants will remain ignorant of them. Moreover, because the "orders" are available only from the Clerk of the Seventh Circuit, located in Chicago, persons residing elsewhere or people who are immobilized are even more at a disadvantage both in terms of learning of "orders" and of obtaining them.

We recognize that, despite all, the "orders" are in theory available. But because they are available in indirect ways does not satisfy the First Amendment, as this Court set out in *Virginia State Board of Pharmacy, supra*, at 757 n.15:

> The dissent contends that there is no such right to receive the information that another seeks to disseminate, at least not when the person objecting could obtain the information in another way, and could himself disseminate it. Our prior decisions, . . . are said to have been limited to situations in which the information sought to be received "would not be otherwise available;" emphasis is also placed on the appellees' great need for the information, which need, assertedly, should cause them to take advantage of the alternative of digging it up themselves. We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out asking him what it is. Nor have we recognized any such limitation on the independent right of the listener to receive the information sought to be communicated. . . . As for the recipient's great need for the information sought to be disseminated, if it distinguishes our prior cases at all, it makes the appellee's First Amendment claim a stronger rather than a weaker one.

See also, *Linmark Associates, Inc.* v. *Township of Willingboro,* 45 U.S.L.W. 4441, at 4443 (May 2, 1977).

Apart from the question of accessibility to the information sparingly disseminated by the Court, there is the even more damning ban on the use of the information once

secured. The right to receive information becomes a hollow thing if the recipient is barred from using the information. Granted, the recipient can tell his fellows about an "order" he has obtained; granted, also, the press can report on it. But it is sophistry to suggest that this really responds to the problem. The major value of the information lies in its use in the forum from which it emanated—the courtroom. And that forum is closed by Rule 35. In effect, Rule 35 says to the litigant and the lawyer: "You may, if you are able, hear what we have said, but you may not tell us that we have said it." That certainly rings a different note than did this Court in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 495 (1975):

> [T]he First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in public records open to public inspection.

What was said by this Court in the context of a copyright dispute applies equally here:

> The whole work done by the judges constitutes the authentic exposition and interpretation of law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute.

Banks v. *Manchester,* 128 U.S. 244, 253 (1888). See also, *Garfield* v. *Palmieri,* 193 F. Supp. 137 (S.D.N.Y. 1961), aff'd 297 F.2d 526 (2nd Cir. 1962), cert. denied 369 U.S. 871 (1962); *Lowenschuss* v. *West Publishing Co.,* 542 F.2d 180, 185 (3rd Cir. 1976).

The other distinction on the basis of which it might be contended that Rule 35 differs from the advertising ban in *Virginia State Board of Pharmacy, supra,* focuses on the speaker's perspective, rather than the listener's. In *Virginia State Board of Pharmacy,* the Court reasoned:

> "Freedom of speech presupposes a willing speaker . . . (W)here a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both." 425 U.S. at 756.

Arguably, the Court of Appeals is an unwilling speaker, given Rule 35. But, obviously, that takes the matter too far. Reluctance does not equate with refusal. And here, while perhaps reluctant, the Court clearly speaks publicly: its unpublished "orders" are secret by circumstance, not by mandate of the Rule. The lucky litigant, or the enterprising newsperson, can find—and broadcast—an "order", although again only outside the courtroom.

The distinctions between *Virginia State Board of Pharmacy* and this case failing, the invidious disparity remains: while the consumer in Virginia has a right to receive information and to use it, the lawyer and the litigant in the Seventh Circuit do not. The squaring of this situation with the First Amendment just is not feasible. Again as this Court said in *Cox Broadcasting Corp.* v. *Cohn, supra,* at 495, quoting from *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572 (1942):

> The publication of truthful information available on the public record contains none of the indicia of those limited categories of expression, such as "fighting" words, which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Only two responses remain available to the proponent of Rule 35 in the face of the First Amendment. The first is that the information suppressed is unnecessary, at any rate, since even were the litigant to obtain it, he could not use it in the courtroom. The circularity of such an argument is self-evident—the information is not needed

only because the very Rule at issue renders it unusable. But apart from that circularity, there is the further reply that the First Amendment simply does not compass a notion whereby speech's protection varies with its purported utility. *Virginia State Board of Pharmacy, supra,* and *Linmark Associates, Inc., supra,* reiterate the fundamental premise that the First Amendment serves to allow all speech (save that falling within specific exceptions, such as obscenity, which are totally irrelevant here) to be heard. It is for the people to decide what speech has merit, not for government to substitute its judgment instead. *Virginia State Board of Pharmacy, supra,* at 770.

Even taking the response of non-utility on its face, the fact is that unpublished decisions indeed do have very significant value to the attorney, to the litigant, and to the public. See Section IIIA-1, *supra.*

The second argument for Rule 35 invokes the burden imposed upon the Court if it is required to publish all rulings it issues in written form. In the First Amendment computation this burden simply carries insufficient weight to overcome the thrust of the Amendment. Even apart from general principles of First Amendment doctrine, there is the overwhelming fact that the burdens imposed by non-publication and non-citation, as discussed *supra* in Section III, are too heavy a price to pay in the name of administrative convenience, particularly when a fundamental right —freedom of speech—is at stake. See e.g., *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, 647 (1974); *Stanley* v. *Illinois,* 405 U.S. 645, 656 (1972).

Moreover, less restrictive alternatives are available to the Court to meet the burden of writing opinions, and these being present, they must be first applied. *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). For example, the Court could undertake to still rule in some cases by "orders," but publish only abstracts of the rulings. Thereby, anyone could become apprised of the decision and learn the essence of it.[42]

In *Virginia State Board of Pharmacy, supra,* this Court stressed the personal and societal benefits flowing from informed decision-making. 425 U.S. at 762-65. In the name of these benefits, the Court concluded that even speech hawking merchandise is protected by the First Amendment from governmental suppression. Here we address information of an even more weighty nature. If the First Amendment places a premium on commercial speech in the name of enabling the public to more wisely determine "how that (commercial) system ought to be regulated or altered," *Virginia State Board of Pharmacy, supra,* at 765, it can hardly afford less protection for the public's assessment of the justice system which its Constitution and national legislature have structured, and which its tax dollars sustain.

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[42] Such abstracts were used, for example, by the Illinois courts. See Commission Hearings, *supra* note 3, Lassers Testimony, *supra* note 3, at 557, 585. See also, speech of Mr. Justice Stevens, addressing the Illinois State Bar Association's Centennial Dinner in Springfield, Illinois, on January 22, 1977:

> (T)he Illinois appellate courts, unlike their federal counterparts, have demonstrated the validity of a distinction between not publishing an opinion and a prohibition against its citation. For the practice of publishing nothing more than an abstract has existed in Illinois for as long as I can remember. I do not suggest that the Illinois practice is perfect; for I would require a party who wanted to rely on an unpublished precedent to provide his adversary and the Court with a copy of the cited opinion. But the Illinois practice does demonstrate the validity of the distinction between non-publication and a non-citation rule.

C. CIRCUIT RULE 35 IMPOSES A BALD CENSORSHIP SCHEME ON ATTORNEYS AND LITIGANTS, AND THUS INFRINGES UPON THE FIRST AMENDMENT.

Amicus has already addressed the mythical nature of a "right to know" if the listener, once learning of information, is barred from disseminating it. See Section IVB, *supra*. But in terms of First Amendment doctrine, one need not address Rule 35 only in the context of the "right to know." For separate and apart from the matter of Rule 35's impact on this right, there is the fatal fact that Rule 35 imposes a bald scheme of censorship. It states, flatly and bluntly, that there are certain things which attorneys and litigants may not discuss in any court within the Seventh Circuit.

Unless the speech which these attorneys and litigants would utter if they could falls within some doctrinal exception, such as obscenity, the Court of Appeals' censorship scheme falls before the First Amendment. And of course the conclusion is a clear one, for indeed discussion of the public rulings of a federal court of appeals hardly fit within any category this Court has excerpted from the ambit of the Amendment.

The only conceivable justification that might be fashioned would be the argument that Rule 35 simply constitutes a regulation of speech in terms of place. This type of regulation, free of any focus on the content of the speech, has been upheld on numerous occasions by this Court. See *e.g., Cox* v. *Louisiana,* 379 U.S. 536 (1965); *Cox* v. *New Hampshire,* 312 U.S. 569 (1941). To apply these cases, regulating the use of the public forum, to the instant case, however, is to go much too far.

Effectively, Rule 35 says to the willing speaker—the attorney or litigant desirous of citing an unpublished

"order" to a court within the Seventh Circuit—that he may not speak at all. It is specious to contend that his First Amendment rights are unimpaired, since he may speak elsewhere. For the reality is that the only relevant locus for speaking is the courtroom; to suggest that the attorney may discuss a relevant decision outside these chambers is to suggest an alternative forum which is no forum. And of course, the notion of speech being suppressable in one place because other fora are available is itself an unacceptable one. See e.g., *Schneider* v. *State,* 308 U.S. 147 (1939).

Moreover, unlike time, place, and manner regulations, Rule 35 is content based. Not all speech is banned from Seventh Circuit courtrooms, but rather, only speech concerning unpublished "orders." *Cox* v. *Louisiana, supra,* therefore, and its analogues, do not really apply.

D. CIRCUIT RULE 35 IS VAGUE, AND THEREFORE FALLS BEFORE THE FIRST AMENDMENT.

Vagueness is a vice which the First Amendment does not tolerate. See e.g., *Hynes* v. *Mayor of City of Oradell,* 425 U.S. 610, 620-22 (1976). While Circuit Rule 35 on its face purports to establish a comprehensive and coherent set of guidelines for the determination of which rulings of the Court of Appeals shall be published as "opinions," the very fact that so many significant rulings have been issued as "orders," see Section IIID, *supra,* demonstrates that the guidelines are in fact vague. They have failed to adequately direct the Court. And because the Court's determination not to publish rulings—with the correlative ban on citation following therefrom—impinges on First Amendment rights, Rule 35 must fail for vagueness.

V.

EVEN IF THIS COURT SHOULD CONCLUDE THAT THE JURISPRUDENTIAL AND CONSTITUTIONAL DEFECTS OF CIRCUIT RULE 35 DO NOT COMPEL ITS ABOLITION, IT SHOULD STILL, IN LIGHT OF THESE DEFECTS, BE NARROWED BY THE EXERCISE OF THIS COURT'S SUPERVISORY AUTHORITY.

This Court has supervisory authority over the lower federal courts. Section IIIG, *supra*. Should this Court conclude that the jurisprudential defects and the constitutional flaws of Rule 35 are not so severe as to compel its total demise, it should still—in light of these defects—narrow the scope of the Rule.

There are a number of modifications which can be made so as to at least mitigate the flaws in Rule 35.[43] This Court could direct that whenever a determination is made by the Court of Appeals that an appeal does not warrant a

[43] We would note that the legal community at large has had only informal access to the Court's rule-making process. While the Court of Appeals recently, in recodifying its Rules, did solicit the views by letter of amicus (and assumedly the other local bar associations, as well), it has never conducted formal hearings allowing various positions to be publicly presented and then discussed. The "(l)ack of public debate and publication of local rules before adoption" has been cogently criticized. See e.g., Weinstein, "Reform of Federal Court Rulemaking Procedures," 76 Colum. L. Rev. 905, 952 (1976). Prior to the Court of Appeals' recent solicitation of comments by letter, the Court did—after adoption of Rule 35's predecessor—request the Bar Association of the Seventh Federal Circuit to undertake a survey of lawyers' views of the no-publication, no-citation Rule. A grand total of 42 attorneys received questionnaires; 18 responded. Of the 18, 9 felt that the Rule should be modified or abrogated (4 did not respond to the question at all). Commission Hearings, *supra* note 3, at 465-70.

published opinion expressing the Court's disposition, it first consider the option of simply adopting the opinion of the district court.[44] This approach would at least assure that the disposition of the case on appeal is a matter of public, published record. Of course, a premise to this approach is that the trial court opinion would have to be published.

Second, this Court could direct that all dispositions which reverse a lower court ruling be published—whether or not the lower court ruling itself has been published. This would expand upon the present form of the Rule, which only requires that reversals be published in the instance of lower court or administrative rulings which themselves have been published. Rule 35, § (c)(1)(v).

Third, the court could direct that all appellate court dispositions in which a dissent appears be published. While dissents are rare, this modification would at least assure that those decisions wherein the issues are difficult enough to elicit formal disagreement will see the light of publication, thereby reflecting the difficulty of the issues.

Fourth, Rule 35(d)(2) should be modified. This provision recognizes the right of a single federal judge to make available an opinion for publication, but thence in effect limits the exercise of that right by further stating that "it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish." We realize that federal judges are not necessarily timid individuals. Nonetheless, we view the potential for peer pressure—pressure which is sanctioned by section (d)(2)—to be serious enough to warrant elimination of the caveat to the right set out in the section.

[44] The Court of Appeals on occasion does take this tack. See e.g., *McDonald* v. *Board of Trustees of the University of Illinois*, 503 F.2d 105 (7th Cir. 1974).

The remaining two modifications are the most significant. This Court should direct that Rule 35 provide that any person may not only move for publication, but that publication shall follow such motion, provided the motion is neither frivolous nor made in bad faith. The movant, in other words, can be required to set out with particularity the bases for his motion, but the burden shall be on the Court to justify denial of the motion, rather than on the movant to prove that the motion should be granted.

Lastly, Rule 35 should be modified so that it will provide that even for unpublished "orders" an abstract of the "order" shall be published, to be printed in the Federal Reporter as are published "opinions." This device, employed in Illinois and applauded by Mr. Justice Stevens, for one,[45] would enable attorneys and litigants to at least learn of such "orders," and if they so choose, they could thence obtain them from the Court of Appeals by specifying those "orders" which they desired.

These abstracts would go a considerable distance towards mitigating some of the most serious evils of Rule 35. They would, for example, enable persons located outside the city of Chicago, where the Seventh Circuit Court of Appeals sits, to gain access to the "orders", since the abstracts would in effect be a published, subject-matter index to the unpublished rulings—something which now simply does not exist. Moreover, the abstracts would significantly diminish the inequality which now exists between institutional litigants who, because of their regular appearance before the Court, have familiarity with unpublished "orders," and the litigant who only sporadically, if even more than once, finds himself in the federal courts.

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[45] See note 42, *supra*.

VI.

SUMMARY

Amicus urges upon this Court the conclusion that the Seventh Circuit Court of Appeals' no-publication, no-citation rule exacts a very heavy toll. It derogates from equal justice, and it depreciates the quality of justice. Whether these vices are cast in terms of bad policy or First Amendment infringement, they lead to the same result—abolition of Circuit Rule 35. At the very least, they compel significant modification of the Rule.

CONCLUSION

For the foregoing reasons amicus curiae Chicago Council of Lawyers respectfully urges this Court to strike down Circuit Rule 35 of the Seventh Circuit Court of Appeals or, as a less satisfactory alternative, to direct the modifications suggested herein in the Rule.

Respectfully submitted,

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